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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 872

EDWARD DAVIS,

Petitioner,

—v.—

UNITED FRUIT COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. .....

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UNITED FRUIT COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, EDWARD DAVIS, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United State Court of Appeals for the Second Circuit entered October 3, 1968, affirming the judgment of the United States District Court for the Southern District of New York, dismissing the complaint herein.

Opinions Below

The decision of the United States District Court for the Southern District of New York, MacMahon, *J.* is unreported. There was no formal opinion. Excerpts of the transcript in that Court, are reproduced in Appendix A to this petition.

The decision of the United States Court of Appeals for the Second Circuit has not yet been reported. It is reproduced in Appendix B to this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 3, 1968. It is by its terms final. The jurisdiction of this Court is invoked under 28 U. S. Code Section 1254 (1).

Questions Presented

(1) Was due process denied to a seaman when the District Court Judge refused a five-day (2 Court-days) continuance to permit plaintiff to return from his ship at sea to the courtroom for his day in Court?

(2) Was it error to proceed to trial in the absence of the plaintiff and rely only upon the transcript of his deposition, thereby depriving him of his right to a jury trial, contrary to the provisions of the Seventh Amendment to the Constitution of the United States?

(3) Since the inception of Maritime law, Merchant seamen have been considered as the wards of the Admiralty. Have the decisions below, in their application of the calendar rules of the Southern District of New York, failed to recognize the duty of the Court to protect the seaman who is the petitioner herein?

Constitutional Provisions and Statutes Involved

Seventh Amendment to the Constitution of the United States:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Federal Rules of Civil Procedure, 28 U. S. C.

Rule 1 *"Scope of Rules."* These rules govern the procedure in the United States district courts in all suits of a Civil nature whether cognizable as cases at law or in equity or in admiralty, ... They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 26 (d) *"Use of Depositions."* At the trial or upon the hearing of a motion or any interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party . . . may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Courts finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open Court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part intro-

duced, and any party may introduce any other parts. . . . "

Rule 41 (b) *"Involuntary Dismissal: Effect Thereof."* For failure of the plaintiff to prosecute or to comply with these rules or any order of Court, a defendant may move for dismissal of an action or of any claim against him. . . .

Statement

On December 23, 1964, plaintiff employed as a seaman aboard the S.S. MORAZON, owned by the defendant United Fruit Company, slipped on a grease spot on the deck of the vessel, sustaining an injury to his finger. Davis was treated at the United States Public Health Service Hospital and was eventually marked fit for duty on February 15th, 1965. The present litigation was commenced some four months afterward. Plaintiff's attorneys filed a note of issue on July 8th, 1966 certifying that the case was "in all respects ready for trial". The case came on for pre-trial conference on August 28th, 1967 and was placed on the Ready Waiting List of the Calendar of the Southern District of New York. On March 4th, 1968, the case moved up to the Ready Day Calendar. The Ready Day Calendar indicates the next 100 cases to be tried. On March 7th, 1968, only three days after the case's first appearance in the Ready Day Calendar, plaintiff's attorney wrote to Davis noting that the trial would come up quite shortly and advising Davis to contact him immediately. On March 18th, 1968 pursuant to S. D. N. Y. Calendar Rule 6 (d), plaintiff's attorney was given 24 hour telephone notice that the case was being assigned to Judge Lloyd M. MacMahon's part for trial. On March 20th, the attorney was finally notified that the trial

would start on March 21st. However, several days before March 21st, plaintiff's attorney advised Judge MacMahon's law clerk that Davis would not return from sea until March 26th, as he was presently at sea on a voyage. This information was based on a phone call from plaintiff's wife. On March 21st, counsel formally asked for a continuance, which motion was not objected to by the attorneys for the defendant. Nonetheless the Court denied the request on the ground that it was faced with a heavy calendar and that cases reached for trial must be ready to proceed.

The case proceeded to trial and plaintiff's deposition, taken at the instance of the defendant for discovery purposes in 1965, was made to be plaintiff's direct testimony. It is reproduced in Appendix C to this petition.

The case was completed, a jury verdict was received in favor of the defendant.

On appeal, the Second Circuit Court of Appeals affirmed the judgment and denied that Judge MacMahon had been guilty of an abuse of discretion in failing to grant the continuance. The decision was rendered on October 3, 1968, and plaintiff therefore seeks a writ of certiorari for review of said findings at this time.

Reasons for Granting the Writ

In their respective decisions in this action, both the District Court and the Court of Appeals, have set a dangerous and grossly unfair precedent for United States Merchant seamen.

In failing to allow a continuance in this action, the lower courts have set up a policy which necessarily and unduly

discriminates against seamen. This runs contrary to almost every pronouncement of this Court on the rights of seamen.

This Court has recognized that the Maritime law gives to Merchant seamen a special status and standing; to wit, they are regarded as "wards of the Admiralty."

The reasoning behind such a classification was well reasoned by this Court in *Socony Vacuum Co.* v. *Smith,* 305 U. S. 424, 430-1:

> "The seaman, while on his vessel, is subject to the rigorous discipline of the sea and had little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provide harsh treatment. *He cannot leave the vessel while at sea.* Abandonment of it in port before his discharge, to avoid unnecessary danger of employment, exposes him to the risk of loss of pay and to the penalties for desertion. In performance of duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action. Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling." (Emphasis added.)

This principle, that there is no reason to impose on seamen the rigid and harsh rules of the common law, has been expounded again and again. See *Blanco* v. *Phoenix Com-*

pania, 304 F. 2d 13 (4th Cir. 1962), and *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406, 408-9 (1953).

Of course, the granting of a continuance rests in the sound discretion of the district court judge. In certain circumstances, it is conceded, even seamen would not merit special consideration in granting a continuance. For instance, in *Kenney* v. *California Tankers Company,* 381 F. 2d 775 (3d Cir. 1967), cert. den. 390 U. S. 904, a case relied on by the Court of Appeals in their decision below, dismissal of the case and denial of a continuance was affirmed, but this was a situation where the plaintiff-seaman's attorney utterly failed to prosecute the case. Also, in *Torino* v. *Texaco, Inc.,* 378 F. 2d 268 (3d Cir. 1967), a dismissal was upheld, but that was a situation where the plaintiff-seaman had obviously failed to keep in contact with his attorney and as a result missed appearing at his trial.

In the instant case, both plaintiff and his attorneys were in touch with each other, and there was full and complete prosecution of the case by the attorneys. This, then, is the very type of incident which should be encompassed within the protective wardship sphere that Federal Courts exercise over merchant seamen. It is therefore strongly urged upon this Court that the failure of the District Court and the Court of Appeals below to recognize the wardship theory in this case is an abuse of discretion, meriting a new trial.

"Abuse of Discretion" is necessarily a nebulous term which must be broad enough to cover many situations of varied character. However, on two occasions the Eighth Circuit Court of Appeals has expounded a widely accepted formula used to review cases in which abuse of discretion in the District Court is at issue. That court has said that—

> "Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the purpose for which the power exists . . . , and the process of an appellate court in examining exercised discretion is not one of creating prescriptions and definitions for the curbing of judgments generally, but simply one of viewing the action taken in a immediate case in the relativeness of its entire situation to see whether it compels the conviction that there has been a responsible exercise in a legal sense of official conscience on all the considerations involved in the situation." *Gruenwald* v. *Missouri Pacific R.R.*, 331 F. 2d 983, 986 (8th Cir. 1964), quoting from *Boroles* v. *Goebel*, 151 F. 2d 671, 674 (8th Cir. 1945).

In this regard in *Jarva* v. *United States*, 280 F. 2d 892 (9th Cir. 1960), a case came on for trial at a time when plaintiff was in the hospital. The District Court dismissed the case, but the Ninth Circuit Court of Appeals reversed that determination. It was shown that the defendant would not have been prejudiced by a continuance. Likewise, in the instant case, prejudice would not have resulted to the defendant, whose counsel did not oppose plaintiff's pretrial motion for a continuance.

It is most strongly urged upon this Court, that seamen should not be put at the mercy of Calendar Clerks of the various district courts. It is widely recognized that the published Ready Day Calendar of the Southern District of New York, as it appears in the New York *Law Journal* daily, moves at fits and jumps, if at all. No attorney can tell his seaman-client when his case, appearing on the Ready

Day Calendar, will be called for trial. In addition, the published calendar list is often behind schedule.

Not being able to predict the erratic movements of the Ready Day Calendars, proctors cannot authoritatively advise their clients whether to join the crew of a departing ship so as to be able to earn their livelihood and support their families, or to wait around for a trial that can be called at 24 hours notice, if at all, or which may wait on the Ready Day Calendar for as long as two or three months. If, as in the case of petitioner-Davis, the seaman is unable to proceed within the 24 hour call, his case can be dismissed pursuant to Federal Rules of Civil Procedure, Rule 41, and S. D. N. Y. Cal. Rules 6 (d) and 16 (b).

These provisions when applied to seamen are patently unfair and fly in the face of the wardship theory long ago expounded by and repeatedly approved by this Court. The District Court is thereby guilty of an abuse of discretion in failing to consider the circumstances surrounding this case, and the status of the plaintiff-Davis as a ward of the Court.

It should be noted that the exigencies of a trial court with such a heavy calendar as does exist in the Southern District of New York, might justify the calendar rules here in question. For the majority of cases, the rules work no hardship. However, when applied to United States Merchant seamen in the manner done herein, the rule works such an inordinate hardship, that its present exercise must be found to be an abuse of judicial conscience. As Judge Croake said in *Byron* v. *Bleakley Transportation Co.*, 43 F. R. D. 413, 415-16 (S. D. N. Y. 1967):

APPENDICES

APPENDIX A

Excerpts from Transcript of Testimony

[103]

* * * * *

New York, March 21, 1968;
11:00 o'clock a. m.

* * * * *

[104] (In the robing room.)

Mr. McElligott: Your Honor, on behalf of the plaintiff I would like to make a motion. We advised the clerk of the court and I believe it was your law clerk several days ago that we received information from our client's wife that he was on a ship of the United States Merchants Marine which is somewhere in the vicinity of Venezuela, and we got the message that he will be back on March 26, 1968. We ask for an adjournment to that time for the following reasons: One is that we did notify him on March 7 by letter, which I will offer in evidence as an exhibit, that his case was coming up for trial shortly and to come into our office and I believe that he was already at that time at sea.

The Court: You don't know that he was at sea?

Mr. McElligott: I'm not positive.

The Court: Did you make any effort to check up?

Mr. McElligott: No, sir, I did not. I just finished a trial yesterday afternoon myself.

[105] Another reason being that the plaintiff was not physically examined by a doctor, so that I will

have a doctor here to testify only from the Public Health Service records. We do not have a doctor who examined him and can testify after examining him, and in view of the fact that he will be back in five days I ask the Court's indulgence to put it over to the 26th or the 27th. I realize there is a laudatory effort being made by the judges of this court to clean up the calendar, but consideration should be given to the protection of the rights of all parties concerned and the motion should be granted on behalf of my client.

We have a deposition of the plaintiff. I understand that your Honor sometimes allows counsel to go ahead with the plaintiff's deposition and 90 per cent of the questioning is done by the defendant's attorney merely for the purpose of discovery and for their own purposes of the defendant.

The Court: I can't help it if lawyers are incompetent.

Mr. McElligott: Therefore, your Honor, under all these circumstances, that is my position.

[106] The Court: Denied.

Mr. Butterfield: I would not oppose the motion.

The Court: Denied. I don't want any argument from you on it. It is over.

What is the next motion?

Mr. Butterfield: Inasmuch as we are now forced to proceed, I want to go on record to object to the use of the plaintiff's deposition.

The Court: Object at the right time, not now. I don't rule on problems until they come up.

Mr. Butterfield: Your Honor, it is going to come

> "... Where the net result of adhering to the letter of the Rules is to thwart rather than to promote justice, the Court must be wary of their rigid application."

In the Court of Appeals, the decision of the District Court to proceed to trial on plaintiff's deposition, was upheld, inasmuch as the basic premise (denial of the motion for a continuance) was upheld. It is contended that the underlying decision was an abuse of discretion. Moreover, once denying the continuance on the grounds that plaintiff could proceed based on a deposition almost three years old, petitioner contends that both of the Courts below have failed to perceive the character of discovery depositions, and have improperly denied plaintiff of his right to a trial by his peers based on his own proofs.

Federal Rules of Civil Procedure Rule 26 deals with the manner of taking, and uses of, depositions. They are in the main, considered to be pre-trial discovery devices, and to that end, depositions have been one of the greatest discovery tools of the post-1938 Federal practice modifications. Of course, depositions may be used as testimony upon trial. Rule 26 so contemplates, in various situations set out therein.

However, the instant case is one where plaintiff's own discovery-deposition, taken at the instance of the defendant, and being questioned solely by the defendant for its own discovery and investigative purposes, was made into plaintiff's only proof, upon trial, of the occurrence of the injury and the circumstances surrounding the incident. This was done even though the District Court Judge was fully aware of the circumstances under which the deposition was taken; to wit only for discovery purposes.

In affirming the District Court's determination, the Court of Appeals admonished that since seamen will not always be present for their trials, depositions should always be taken by the seamen's attorneys, to hedge against the contingency of non-appearance. This then means that the Court of Appeals is turning a pure discovery device into a trial technique and compels plaintiffs' attorneys to divulge their trial strategy well in advance of the trial date. It also puts plaintiffs to great expense for the transcription of testimony is not inexpensive. Moreover, the Federal Rules of Civil Procedure identify, as a national policy, the minimization of the costs of litigation. Federal Rules of Civil Procedure Rule 1, *Farmer* v. *Arabian Oil Co.*, 379 U. S. 227, 234. Therefore the Court of Appeals' suggestion of an alternative open to seamen, runs contrary to the spirit of the Federal Rules.

To be sure, in some few cases, the introduction of the deposition of the plaintiff, as plaintiff's testimony at trial, is proper. However, these circumstances are indeed rare. For example, if the original plaintiff were to die prior to trial, but after the deposition, his deposition ought to be introduced into evidence.

Also, if plaintiff subsequently is adjudged an incompetent, his deposition should be read. *Field* v. *American-West African Line, Inc.*, 154 F. 2d 652 (2d Cir. 1946) (insanity).

However, in a situation like the instant case where plaintiff was indeed available within two Court days, it is a mockery to proceed on a discovery-oriented deposition.

The Seventh Amendment to the Constitution of the United States guarantees a litigant of his right to a jury

trial before his peers. In proceeding in the absence of the plaintiff here, the District Court Jury was denied an opportunity to see and hear the plaintiff. What the jury did hear was testimony taken nearly three years prior to the trial, which testimony was taken at the instance of and by the defendant. There was no opportunity, at the trial for Davis to place his case before the jury in a logical and complete order and in the method and wording most beneficial to him. The jury was therefore deprived of plaintiff's full and orderly exposition of the facts.

In addition, the jury surely must have been influenced against the plaintiff because of his absence. The feeling surely had to be that plaintiff did not "care" enough to be present at his own trial, when nothing could be more further from the truth.

These influences mandate a reversal of the decisions below. As this Court said in *Dimick* v. *Scheidt,* 293 U. S. 474, 486 (1935):

> "Maintenance of the Jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

The fact that the jury was denied a full and complete opportunity to hear the plaintiff's case is, in essence, a denial of the plaintiff's right to a jury trial, consistent with the Seventh Amendment.

CONCLUSION

Therefore, it is respectfully urged that this Court grant the Writ of Certiorari sought herein, so as to enable it to consider the Constitutionality and propriety of the actions of the Courts below, in forcing plaintiff to proceed to trial based solely on the deposition, and in failing to grant a continuance of five days (which in reality was only two court days), so as to allow plaintiff to be present and to testify at his own trial.

Respectfully submitted,

JAMES DAVID AUSLANDER
Attorney for Petitioner

up as the first witness. I would like to go on record that I am not going to—

The Court: You must object before the jury. That is precisely the point. I won't rule on it here.

Mr. Butterfield: Also, I would like you to instruct plaintiff's counsel that the use of the deposition cannot be referred to other than the fact that it is a deposition and that an emotional plea cannot be made to the jury in any [107] respect as to his absence from this court. It goes in strictly as the deposition taken and no more.

The Court: I rule on problems when they come up in the courtroom, as an umpire rules on baseball when it goes over the plate.

All right, let's get off the record.

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APPENDIX B

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 98—September Term, 1968.

(Argued October 3, 1968 Decided October 3, 1968.)

Docket No. 32347

EDWARD DAVIS,

Plaintiff-Appellant,

—v.—

UNITED FRUIT COMPANY,

Defendant-Respondent.

Before:

LUMBARD, *Chief Judge,*
KAUFMAN and HAYS, *Circuit Judges.*

Appeal from a judgment after a jury trial of the United States District Court for the Southern District of New York, MacMahon, *J.*, dismissing the complaint, alleging that the trial court abused its discretion in refusing to order a continuance.

Affirmed.

THOMAS E. P. MCELLIGOTT, New York, N. Y. (Fields, Rosen, McElligott & Auslander, of counsel), *for plaintiff-appellant.*

THOMAS H. WALKER, New York, N. Y. (Burlingham, Underwood, Wright, White & Lord, of counsel), *for defendant-appellee.*

KAUFMAN, *Circuit Judge*:

Although the decision below was affirmed in open court, we are of the view that it is appropriate for us to give our reasons for the affirmance in some detail. This appeal illustrates the difficulties which district court judges encounter in seeking to cope with calendar congestion and at the same time to administer justice wtih reasonable efficiency. Edward Davis appeals from a judgment for the defendant after a jury trial in his action for personal injuries incurred aboard a ship owned by United Fruit Company, arising from negligence or unseaworthiness. He claims that Judge MacMahon abused his discretion in refusing to grant a continuance of the action until Davis' ship returned from its voyage.

On December 23, 1964, Davis, a seaman on board the S.S. Morazan, owned by United Fruit Company, slipped on a "50¢ piece size spot of grease," injuring a finger. After treatment by the Public Health Service, Davis was found fit for duty by the following February 15. By May 26, 1965, he retained Mr. McElligott as his counsel, and commenced the present action. The defendant on June 29, 1965, took Davis' deposition. On July 8, 1966, Mr. McElligott filed note of issue and at that time certified that the case was "in all respects ready for trial." After a pretrial conference on August 28, 1967, the case first appeared on the "Ready

Waiting List" in the New York Law Journal of January 12, 1968. The case continued to appear daily on that list until March 4, 1968, when it first appeared on the published "Ready Day Calendar." Thus, from January 12, 1968 until March 20, Davis' case was listed daily in the New York Law Journal first on the "Ready Waiting List," and then on the "Ready Day Calendar."

In the meantime, Mr. McElligott, on March 7, sent a letter to Davis noting that the trial was coming up soon and advising Davis to contact his office promptly. From the record before us, it would appear that this was the only effort counsel made to find Davis before the trial. On March 18, Mr. McElligott was given 24-hour telephonic notice[1] that the case was being assigned to Judge MacMahon's part for trial, and on March 20 he was finally notified that the trial would actually commence the following day. When the case was called on March 21, counsel advised Judge MacMahon that Davis was at sea. He asked that the case be continued until March 26, at which time, he said, Davis' ship would be in port. When questioned by the court, counsel admitted that he was not sure whether or not Davis was in fact at sea.[2] Although the defendant did not object to a continuance, the court denied counsel's request on the ground that it was faced with a heavy calendar and that cases reached for trial must be ready to proceed. See S. D. N. Y. Cal. Rule 6(d), 7(b) and (c).

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1 Pursuant to S. D. N. Y. Cal. Rule 6(d) which requires that the case "must be ready to proceed to trial" when the notice is given. See also Rule 7(b)(1).

2 Several days before March 21, counsel for Davis evidently advised Judge MacMahon's law clerk that Davis would not return from sea until the 26th. Presumably this was based on a phone call from Mrs. Davis to counsel in response to McElligott's letter of March 7. It is unclear exactly when this was communicated to Judge MacMahon's chambers but, clearly, this is not the method provided by the Court rules for requesting a continuance.

It is important to note that we are not dealing with a case which had been dismissed without affording the litigant a decision on the merits.[3] Here, counsel proceeded to trial and made use of Davis' deposition taken by the defendant. It was read to the jury, and the ship's records, injury report and medical log were also available to Davis' counsel to support his claim. Basically, therefore, appellant's claim is that his case was not presented "in its best light" because of the court's refusal to grant a continuance until Davis could make a personal appearance at his trial.

The authority to decide whether a continuance should be granted is entrusted to the sound discretion of the trial judge. Before we will upset his ruling, it must be established that he acted arbitrarily. *United States* v. *Ellenbogen*, 365 F. 2d 982 (2d Cir. 1966). We believe that, in this case, there were sound grounds to deny the continuance. Mr. McElligott knew that his client was an itinerant seaman. It was clearly foreseeable to any lawyer engaged in trial practice that, with the unpredictable movement and acceleration of calendars, Davis might be at sea when the case was called for trial. In the 3½ years between the accident and the trial, and, surely, in the 2½ months during which the case was listed daily in the Law Journal, counsel could have prepared for this contingency. He should either have taken

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3 Even in situations where the district courts have dismissed cases because of delaying tactics and without reaching the merits, we have not found this action to be an abuse of discretion. See *Schwarz* v. *United States*, 384 F. 2d 833 (2d Cir. 1967); *Interstate Cigar Co.* v. *Consolidated Cigar Co.*, 317 F. 2d 745 (2d Cir. 1963); *Demeulenaere* v. *Rockwell Mfg. Co.*, 312 F. 2d 209 (2d Cir. 1962), cert. denied, 374 U. S. 813 (stressing the need to keep dockets current); *Skainey Basket Co.* v. *S. S. Radnik*, 312 F. 2d 177 (2d Cir. 1963); *Life Music* v. *Edelstein*, 309 F. 2d 242 (2d Cir. 1962) (pre-trial order); *Ohleger* v. *United States*, 308 F. 2d 667 (2d Cir. 1962) (failure to prosecute); *Newton* v. *United States*, 308 F. 2d 668 (2d Cir. 1962); *Scott* v. *Spanjer Bros.*, 298 F. 2d 928 (2d Cir. 1962); *Bardin* v. *Mondon*, 298 F. 2d 235 (2d Cir. 1961).

Davis' deposition in order to have his testimony ready in the event his client was not available for the trial, Fed. R. Civ. P. 26 and 27, or have used the occasion of the defendant's examination of Davis to ask questions helpful to his client's cause. Moreover, the record does not show that counsel exerted any effort to follow Davis' movements or took any other steps to prepare his case for trial during the long interim.

The failure to be ready for trial when called—unfortunately, a condition too prevalent in our courts[4]—is one of the basic causes creating a backlog of calendars.[5] The ensuing delay caused by adjournments and other dilatory tactics, not only hobbles justice but causes the public to mistrust the entire judicial process. Chief Justice Warren, in discussing calendar delays, recently postulated:

> "[T]he litigants usually do not know that the lawyers are the cause of delay and therefore blame the courts rather than their counsel for the delay . . . [T]he very process of delay, whether caused by court congestion or lawyer procrastination, reduces the chance that truth will be found at the trial since the memory of witnesses invariably diminishes with time as does their avail-

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4 As we noted in *Bardin* v. *Mondon*, 298 F. 2d 235, 237 n. 5 (2d Cir. 1961), one of the principal reasons cases are not ready for trial is the failure of some counsel to prepare fully their cases until the last minute.

5 In the 1968 fiscal year, 5,333 new cases were commenced in just the Southern District of New York. That district had 11,247 cases pending at the end of the year and the largest number of pending civil cases of any federal court. Over 300 more actions were brought in fiscal 1968 than were disposed of in the same period, so the waiting list grows ever longer. Administrative Office of the United States Courts, Annual Report of the Director: 1968 at II-40, 41. The instant case was a jury action, and a suit involving a jury trial in the Southern District takes a median time of three years from the time issue is joined until the trial. This is the longest median time interval with the exception of the Eastern District of Pennsylvania, which is forty months. *Id.* at II-21.

ability." Address by Chief Justice Warren, American Law Institute, May 21, 1968, at 5.

The courts must take the initiative in making their procedures more efficient,[6] and the bar must be prepared to cooperate in that effort if the judicial process is to maintain its vitality. The district courts of this Circuit have worked out precise and elaborate methods to notify attorneys of the progress of their cases on the calendars primarily so that counsel can gather in their witnesses and be ready to proceed to trial on schedule.[7] The bar must have equally precise procedures for preparing cases and ensuring that witnesses will be available at trial. And, we know from long experience that if counsel fails to proceed when his case is called for trial in regular turn, the court, having set aside time in expectation of that trial, may forfeit precious hours or days until another case can be readied. Other parties and counsel may be inconvenienced, and jurors may be forced to wait idly.[8] Had Judge MacMahon granted this

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6 The Chief Justice also stated, "I want to center on the conditions which exist in the federal court system: conditions which are presently bad and which are ominous for the future. I hope that I may be able to enlist your aid and the aid of our entire legal profession in the serious work which is needed to meet the congestion which faces the federal courts. The situation is critical. The backlog has, in fact, again grown during the past twelve months, in spite of the additional judges who have been appointed in recent years." Address by Chief Justice Warren, American Law Institute, May 21, 1968, at 1.

7 And not a day passes that the New York Law Journal does not include a summary of the calendar rules in bold-face type which reads in part, "Responsibility for the appearance of attorneys, parties and witnesses in court in readiness for trial is on the attorney of record . . ."

8 Under the Jury Selection and Service Act of 1968, Pub. L. 90-274 (March 27, 1968) which becomes effective December 22, 1968, each juror will be paid $20 a day and 10¢ per mile for travel. There may also be a subsistence allowance of $16 per day.

continuance, not only would valuable trial time have been lost but cases scheduled for trial after this one would have been dislocated at the last moment from their regular order and forced to trial out of turn. *Bardin* v. *Mondon*, 298 F. 2d 235 (2d Cir. 1961). Ergo, disarrangement breeds disarrangement.

Davis suggests that as a seaman he is a ward of the court entitled to special favor. This argument, when urged as a ground for continuance, has been rejected by other jurisdictions. *Kenney* v. *California Tanker Co.*, 381 F. 2d 775, 777 (3d Cir. 1967). It is particularly inapposite in the Southern District which handles far more seamen's suits than any other district court in the United States. Kaufman, Decongestion Through Calendar Controls, 328 Annals of the American Academy of Political and Social Science 84, 85 (1960).

Finally, we turn to the possible objection that we are penalizing Davis for the shortcomings of his lawyer. The short answer is that, since Davis chose his attorney voluntarily, he cannot be permitted to avoid the acts or omissions of his freely selected counsel. Any other notion would be inconsistent with our system of representative litigation. *Link* v. *Wabash R.R. Co.*, 370 U. S. 626, 633-34 (1962); *Nasser* v. *Isthmian Lines*, 331 F. 2d 124 (2d Cir. 1964).

We realize that a court must not let its zeal for a tidy calendar overcome its duty to do justice. Nor do we suggest that it is always proper to proceed on the basis of a deposition in the absence of a party. Nonetheless, the fact remains that the calendars of the Southern District court are clogged and justice is being delayed or perhaps impaired as a result. In order to reduce this choking congestion, the district courts must be permitted to exercise their discretion in appropriate ways that will ensure justice to

all who seek it.[9] We will not interfere with the conscientious judge who will not accept the status quo of calendar congestion. The task of updating calendars is arduous, complicated and burdensome. Since the trial judge must be entrusted with the power to alleviate calendar congestion, we shall not put obstacles in his way when he exercises his judgment wisely in achieving the desired goal.

Accordingly, we hold that the denial of a continuance here was not an abuse of the court's discretion. Affirmed.

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9 Chief Justice Warren further commented "The civil dockets of the federal courts, like the criminal dockets, are falling behind, and though the delays there do not, in most cases, represent the life and liberty of the parties, they often represent suffering and financial loss which a humane society should not tolerate." Address by Chief Justice Warren, American Law Institute, May 21, 1968 at 3.

APPENDIX C

Excerpts from Plaintiff's Deposition Read into the Record

• • • • •

"Examination by Mr. Condon" for the defendants.

"Q. Mr. Davis, on or about December of 1964, were you employed by the United Fruit Company? A. Yes.

"Q. About what ship? A. Morazan.

"Q. How long had you been employed by the United Fruit Company aboard that ship? A. Just—you mean for the total time?

"Q. When did you start to work aboard the Morazan? A. Let's see—on the 22nd, I think.

"Q. 22nd of December? A. Yes.

"Q. 1964? A. Yes.

• • • • •

"Q. Had you been on that ship before that date; had you made the previous trip on that ship? A. No.

"Q. Were you a relief? A. Relief.

"Q. What position were you relieving? What relief were you; were you in the deck department? A. In the deck department.

"Q. What was your rating? A. AB.

"Q. Had you ever sailed on the Morazan before? A. No.

"Q. Prior to joining the Morazan on December 22, 1964, had you worked for a steamship company before that date? A. Oh, yes, Farrell Lines.

"Q. Who did you work for before then? A. Farrell Lines.

"Q. When did you work for them? A. Well, I was discharged—I was discharged in November. November—what date, let me see.

"Q. It doesn't make any difference. Some time in November 1964? A. Yes, 1964.

"Q. So that you were off ship about a month, a month or less? A. Well, November, December—yes, about a month or less.

"Q. And at that time in November or December of 1964, did you live at 1000 Park Place, Brooklyn? A. No, I lived at 1017 Dumont Avenue.

"Q. Where is that? A. That's in Brooklyn.

"Q. Are you married or single? A. Married.

"Q. Do you reside with your wife? A. Reside with my wife.

"Q. When did this accident that you complain of in your complaint occur? A. That was, I think, on the 24th, morning.

"Q. What time of the day? A. That was between two and three in the evening.

"Q. Two and three in the afternoon? A. Yes.

"Q. You say they were securing the ship? A. Yes, I was.

"Q. When you joined the ship, where was she? A. Over in Hoboken.

"Q. Over in Weehawken at the Fruit Terminal dock? A. Yes.

"Q. Was the ship moved from Weehawken to New York? A. Yes.

"Q. Did the accident take place in Weehawken or New York? A. New York.

"Q. When you reported to the ship, that was on December 22nd? A. Yes.

"Q. So, when the accident happened it was a day after you reported to the ship? A. Yes.

"Q. Some time between the 22nd and the 23rd, they had moved the ship to New York? A. That's right.

"Q. Did you assist in that operation? A. Yes.

"Q. Were you employed for that operation? A. Yes.

"Q. When the accident happened, were you on duty? A. Yes.

"Q. When did you go on duty the day of the accident? A. Eight o'clock in the morning.

"Q. When you went on duty, whom did you work with? A. The boatswain.

"Q. Do you remember his name? A. Manuel—I can't rightly remember both of his names. I think it was Manuel.

• • • • •

"Q. Well, when was the ship brought over from Hoboken, on the 22nd or the 23rd? A. She was brought over on the 22nd.

"Q. The same day you joined her? A. Yes.

• • • • •

"Q. When the ship tied up here in New York— A. Yes.

"Q. —was that in the evening? A. No, the night. The evening, yes, but it was the night.

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"Q. Did you stay aboard the ship that night? A. Yes.

"Q. You didn't go home? A. No.

"Q. In other words, you didn't take any leave that evening? A. No.

"Q. And on the 23rd, you reported for work? A. Yes.

"Q. To the boatswain? A. Yes.

"Q. Did anybody else report with you? A. The whole deck hand—all the deck hands were there.

"Q. Did you have to pull the tarpaulin over the edge? A. Yes.

"Q. Did you secure it to the side? A. Yes.

"Q. How did you secure it? A. We secured the cover first, and then the batten, put the batten in.

"Q. Did you put any blocks in? A. Yes.

"Q. Was it after that was done that your accident happened? A. No, that happened in between pulling the cover, when I slipped.

"Q. At this time, what time was it? A. I say around two to three. It was between two and three.

"Q. Had you had your noon meal yet? A. Yes.

"Q. You had finished the noon meal? A. Oh, yes.

"Q. Had you been out on No. 2 deck in the area of No. 2 hatch prior to that, that morning?

"Mr. McElligott: You mean prior to lunch?

"Mr. Condon: Yes.

"A. No, sir.

"Q. Was there any cargo loaded on deck? A. Not at the time.

"Q. Had the longshoremen secured for the day, to your knowledge, when your accident happened? A. Yes, it was no longshoremen there when the accident happened.

"Q. At least in the area where you had your accident? A. No, sir.

"Q. Do you know if they were still loading after, three and four? A. No, sir, they were through.

"Q. Were they still loading No. 1? A. No, they were through.

"Q. Were any of the side hatches open? A. No, we closed the side hatch first before I secured No. 2. We started off, come forward.

"Q. Were you working on the deck to do that? A. No.

"Q. From the ship? A. From the ship.

"Q. Below deck? A. Below deck.

"Q. What were you wearing when you were doing that? Were you fearing work clothes? A. Yes."

Question at line 17:

"Q. What type of reading glasses do you use; what do you use reading glasses for? A. Just for writing and reading.

"Q. In other words, are you nearsighted or farsighted? A. Well, I am farsighted. Near up it hurts me to strain.

"Q. So you have difficulty reading close work? A. Yes.

"Q. When you were on deck, were you wearing gloves? A. Yes.

"Q. Were they your own gloves, working gloves? A. My own.

"Q. Was there anybody in close to you while you were doing your work, right next to you? A. No, sir.

"Q. How many men in all were putting the tarpaulin on the hatch? A. Well, I think—when we did start off securing the hatch, there was about—let me see, now. It was about two or three men on each side.

* * * * *

"Q. And they held it up and put it in place; is that what they did, unrolled it and then put it in place? A. Yes.

"Q. And then you went around putting the battens on and chocking it? A. Yes.

"Q. Did you use a hammer when you chocked it? A. I didn't use no—I didn't do no securing with the wedges, stick the wedges in.

"Q. You didn't do that? A. No.

"Q. The accident happened before that? A. No, after.

"Q. Who did that? A. Who did that?

"Q. Who put the wedges or the chocks in? A. I can't rightly remember.

"Q. Was it one of the ABs? A. I wouldn't be able to see who did it.

"Q. Was the boatswain there? A. Yes.

"Q. Where was the boatswain standing when you had your accident? A. Off the end of the hatch.

"Q. He was on the after end of the hatch? A. Yes.

"Q. On the port or starboard side? A. He was in between.

"Mr. McElligott: Midship.

"The Witness: In between the hatch; midship."

By the Attorney for the Company:

"Q. On the aft end of it? A. Yes.

"Q. He was watching the operation? A. Securing, yes.

"Q. Did he see you fall down? A. No, he didn't.

"Q. When you fell, how did you fall? A. I went down on —when I slipped, I went down like this on my hand (indicating).

"Mr. McElligott: Indicating his foot going back and his hands going down.

"A. (Continuing) My right foot went back so I almost hit my forehead when I went down. I went so close to the iron—that's on the edge of the coaming. So I got up and I didn't pay no attention.

"I had on a pair of those leather gloves and—

"Q. Did your hands hurt you? A. No, didn't hurt me. Only stung me a little; just stung a little. The night, then it started aching.

"Q. In the evening? A. No, the night. In the evening, nothing.

"Q. During the night? A. During the night, about twelve o'clock at night, I got up and it started stinging me.

"Q. You were in your quarters? A. And I opened the faucet and put hot water on it.

"Q. Did you notice it was discolored? A. No, just started to swell. Not change much of a color, just swell up.

"Q. Up to that time, were you able to use your hands? A. Yes, it was swollen up pretty much, but I was using my hand at the time. So next morning I got up and it was still swollen, swollen more.

"Well, I will report this to the chief mate.

"Q. Let me ask you this, after you had your accident, what did you do? A. I didn't do anything to it.

"Q. I mean what did you do on the ship? A. After the accident?

"Q. Yes. A. I did my routine duties.

"Q. That day on the 23rd?

"Mr. McElligott: After you hurt your hand, what did you do?

"The Witness: After hurting my hand?

"Q. Did you continue working? A. No, we were finished securing. We knocked off for the day.

"Q. Did you go for a coffee break? A. Yes.

• • • • •

"Q. Did you stay on the ship? A. Yes, sir, I was on the ship.

"Q. Did you secure for the day at four o'clock, from your watch, I mean? A. Yes.

"Q. Did you have your dinner? A. Yes, I did.

"Q. How many of them were there? A. I suppose the total amount. I didn't check."

Then to the question at line 20:

"Q. What were you assigned to that morning? A. As usual, routine work on deck.

"Q. Were you painting? A. No, no painting.

"Q. Were they loading the ship? A. They loaded the ship that day.

"Q. Did they secure loading? A. No.

"Q. When did they stop loading? A. Well, I wouldn't definitely say when.

"Q. What were you doing?

> "Mr. McElligott: He hasn't finished his answer.
>
> "Do you have an estimate?
>
> "The Witness: I wouldn't be definite to say when they stopped loading because I wasn't checking that department.

"Q. Where did your accident take place? A. Where did the accident take place?

"Q. Yes. A. On No. 2 hatch.

"Q. On the hatch? A. Securing the hatch.

"Q. When it happened, were you on the hatch? A. No, on the deck.

"Q. You were on the deck? A. On the deck.

"Q. Alongside the hatch? A. Yes.

"Q. That is No. 2 hatch? A. No. 2 hatch.

"Q. That was forward of the bridge? A. Yes.

"Q. What side of the hatch? A. On the starboard side on the forward end.

• • • • •

"Q. Was the ship still to the pier? A. Yes, sir.

"Q. Was she starboard side to the pier?" or right side. A. Yes.

"Q. When the accident happened, was the hatch open? A. No.

"Q. Were the pontoons in place? A. Yes.

"Q. What were you putting, a tarpaulin? A. The covers on the tarpaulin.

"Q. Were you working with other men? A. Yes. Well, we were scattered around the hatch. They were all different angles of the hatch.

"Q. They were lifting the tarpaulin into place? A. Yes.

"Q. Were you doing that? A. Yes.

"Q. Were you holding the tarpaulin, were you standing close to the edge of the coaming? A. Yes.

"Q. Were you standing in any particular area along the coaming?

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"Q. Were you standing in any particular area along the coaming? A. Well, as far as it could reach to secure the hatch. We were sticking the cover at the time.

"Q. How long was the side of the hatch on the starboard side, No. 2 hatch? What was the length of No. 2 hatch on the starboard side? A. The length of it? I would say about thirty-five feet.

"Q. Along that thirty-five feet length you were standing? A. Yes.

"Q. Where on that length were you standing? A. On the forward end.

"Q. Near the forward corner? A. Yes.

"Q. Was there anything particular you had to do at that forward corner? A. My routine work, helping to secure the hatch.

"Q. Did you notice anything wrong with your right hand? What finger was it that you injured? A. Yes, it was the finger.

"Mr. McElligott: Indicating the bones behind the little finger on his right hand.

"A. (Continuing) It didn't feel like nothing to me that evening, until the night. Then, the next morning I reported to the chief mate and he gave me epsom salts and told me to soak it.

"Q. From what I understand from your testimony, you fell down about two, two-fifteen; two-thirty or so in the afternoon? A. Yes.

"Q. And you felt a sting in your hand? A. Just a sting, yes.

"Q. And you didn't pay any mind to it any more until you felt the pain around twelve o'clock midnight? A. Yes.

"Q. When the ship got to Norfolk, did you get off? A. When the ship got to Norfolk, my hand was so big then that I couldn't go any more.

"I was determined to make the ship, I tell you the truth, determined to make the trip. Then I couldn't go no further. I had to make up my mind to get off.

"Q. You had to get medical assistance ashore? A. I reported to the purser, and the chief mate told me to see the purser. Let him make out a slip for you for the hospital.

"Q. When you saw the chief mate the next morning and reported it to him, was the ship at sea then; had the ship departed? A. No, still longside.

"Q. Still in New York? A. Still in New York.

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"Q. Had you ever injured that hand before? A. No, sir.

"Q. Before you had your accident, what was the condition of the deck? A. Well, that day, it was raining.

* * * * *

"Q. Were you wearing rubbers? A. No, sir.

"Q. When you fell, was the deck you were on a steel deck? A. No, on the wood deck.

"Q. Is it a wooden deck around the area of the hatch? A. Yes, sir.

"Q. When you fell, did you stand up? A. Yes, I got up after, yes, on my own.

"Q. When you fell, did you continue working on the hatch? A. Yes.

"Q. What did you continue doing? A. We went from No. 2 to No. 1.

"Q. No. 1? A. No. 1 was my last hatch I secured.

"Q. When you were in Norfolk, did they keep you in the hospital? A. Yes, sir.

"Q. For three days? A. Yes, sir.

"Q. Then did you come back to New York? A. Yes, sir.

"Q. Did you report to Hudson and Jay?

* * * * *

"A. Right away.

"Q. Did they treat you there for your hand? A. No. I tell you, when I got back to New York, I was ordered report to the company. Then in six weeks' time, I must go to Hudson and Jay"—the United States Public Health Service—"to take my cast off.

"Q. So you wore the cast for six weeks? A. Yes.

"Q. Then you went to Hudson and Jay?"

The United States Public Health Service.

"A. Then I went to Hudson and Jay"—the United States Public Health Service—"to take the cast off. Then I was out-patient, I think, for two weeks, before they gave me fit for duty.

"Q. Do you recall when you were marked fit for duty? A. I think it was the 15th of February.

"Mr. McElligott: 1965?

"The Witness: 1965.

"Q. Then did you rejoin the ship? A. No, I didn't. I was just relief."

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"Q. When they took the cast off your hand, how many times did you go back to Hudson and Jay? A. Quite a few times for treatment.

"Q. Did they give you some treatment? A. Every other day.

"Q. What did they do for your hand there? A. They put hot water, as hot as I could bear it (indicating).

"Mr. Elligott: Indicating up to the elbow.

"Q. They gave you some therapy with water? A. They put my hand in this water, boiling slightly.

"Mr. Elligott: Stirring water?

"The Witness: Yes, and they give you something to hold onto and move the fingers.

"Q. It is hydrotherapy? A. Yes.

"Q. That is what they did for you when you went there? A. Yes.

"Q. Did the doctor examine your hand? A. Yes.

"Q. Did they X-ray it? A. Hudson and Jay, they took an X-ray there.

"Q. Then you were marked fit for duty? A. Yes, on the 15th.

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"Q. Before you fell, did you notice that the deck was slippery? A. It was wet, that's all.

"Q. Did you notice whether it was slippery?

"Mr. McElligott: Before he fell?

"Mr. Condon: Yes.

"A. Well, I didn't observe that much. I was working. You know, we were working, you don't observe.

"Q. At any time after you fell, did you find out what caused you to fall? A. Yes, sir.

"Q. What caused you to fall? A. Some grease I stepped in.

"Q. Where was the grease you stepped in? A. On the deck.

"Q. What did it look like? A. Well, it was something more or less—it wasn't actually—just betwixt and between. Just like some grease on the top and it fell down. It was about a half-dollar piece on the deck where I slipped.

"Q. Had you noticed that before? A. No, I didn't.

"Q. When you slipped down, what part of your foot slipped on it? A. My right foot.

"Q. But was it your sole or your heel? A. Well, it's supposed to be my sole because I went off like that so fast.

"Mr. McElligott: Indicating his foot slipped back.

"The Witness: I suppose it was the sole of my foot.

"Q. When you slipped, were you leaning over the hatch coaming? A. I was still sticking—yes, at the time I was putting in the iron.

"Q. The iron bar? A. Yes, sir. That's what I was putting in.

"Q. Were you holding the iron bar when you slipped? A. Yes.

"Q. Did the iron bar fall to the deck? A. No, it went in.

"Q. It fell into the slot? A. Into the slot.

"Q. The iron bar you are referring to is the batten? A. The batten, yes.

"Q. Were you bending over when you were putting the iron bar in? A. Yes, sir.

"Q. You were leaning over forward? A. Yes, sir.

"Q. Was the iron bar below your face? A. Yes, it had already gone in.

"Q. How high was the iron bar from the deck when you slipped? A. It was already in place.

"Q. But how high was it while it was in your hands when you slipped? A. Just a matter—well, not too far from the deck. I would say a little over a foot from the deck.

"Q. How much did the batten weigh? A. Not so heavy, sir.

"Q. I don't know how much it weighs. How much does it weigh? A. I would say the whole thing weighs about, say, about thirty pounds, the whole batten.

"Q. Were you lifting it by yourself? A. No, sir.

"Q. Was there someone else lifting it with you? A. No —on the other end.

"Q. Do you remember who was lifting it with you on the other end? A. No.

"Q. What did it look like? A. I can't rightly remember who was working on the other end of the bar.

"Q. There was definitely someone on the other end of the bar? A. Yes, but I can't remember.

"Q. Did he see you fall? A. I don't know if he did or not.

"Q. Did you have any conversation about it at that time? A. No.

"Q. Did you continue working? A. Yes, sir.

"Q. When did you see the grease on the deck? A. After I slipped.

"Q. Was it immediately after or some time later? A. No, right after.

"Q. Did you turn around to look at it? A. Right after I got up and looked to see what I stepped in, and it was grease.

"Q. Was there any mark on your shoe? A. Of the grease?

"Q. Yes, sir. A. Yes.

"Q. Did you look? A. Yes, it was.

"Q. Did you see grease on your shoe? A. Yes.

"Q. On your right shoe? A. On my right shoe.

"Q. Did you reach down to touch it to see what it was? A. Yes.

"Q. Did you dab at it with your finger? A. Yes.

"Q. Did you look at it on your glove? A. Was grease.

"Q. It wasn't any tar from the deck, was it? A. No, sir.

"Q. Is there also tar on the deck? A. Well, that kind of tar is hard. That's what they put in the seam.

"Q. Caulking tar? A. Yes, it rains and everything is hard.

"Q. What was the color of the deck? A. The color of the deck?

"Q. Yes. A. What was the color of the deck? I guess it is oak.

"Q. Could you see the black tar between the oak strips? A. Yes.

"Q. Could it have been tar that you put your finger in? A. No, that was grease.

"Q. It wasn't sticky? A. No, that was grease.

"Q. When you walked up to put the batten in place alongside starboard, was it the starboard side you were putting the batten in place? A. Yes.

"Q. The forward end of Number 2 hatch? A. Yes.

"Q. Had you looked at the deck before you started to work? A. No, sir.

"Q. Generally speaking, when you observed the general area where you were working, how did it look? A. It was wet.

"Q. Didn't look unusual, did it? A. Nothing unusual to me, because I never did observe nothing unusual about a deck like that before.

"Q. Do you know how that grease got there? A. It's very had to say how the grease got there.

"Q. Were there any lines or wood on the deck? A. No, sir.

"Q. Was there any other foreign matter on the deck? A. No, sir.

"Q. Other than the water and the grease? A. No, sir.

"Q. Were your shoes wet? A. Yes, sir, my shoes was because I was walking in the drizzle.

"Q. What type of shoes were you wearing? A. Good shoes. Very good shoes.

"Q. Were they work shoes? A. Very good work shoes.

"Q. High top? A. High top.

"Q. What kind of sole did they have? A. It was leather.

"Q. Was it corrugated leather or fiber shoe? A. It was one of those good shoes. I still has the shoe.

"Q. Do you know the name of the shoe? A. Good type of shoe, working shoe.

"Q. How long did you own the shoes? A. Just new at the time.

"Q. You had just purchased them? A. Just purchased them. They were brand new.

"Q. For that voyage? A. Yes, sir.

"Q. Do you remember where you bought them? A. Let me see where I bought those shoes now—it was in Brooklyn. Yes, I bought the shoes in Brooklyn. It was bought in Brooklyn.

"Q. Brooklyn, you mean— A. Over by one of the Army and Navy stores."

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"Q. How does your hand feel now? A. Well, it's left with a bump.

"Q. Indicating where?

"Mr. McElligott: Indicating the right hand.

"A. And I haven't got the same grip in the finger as I used to. This is my broken hand now.

"Mr. McElligott: Indicating the left hand is longer.

"A. (Continuing) The doctor told me it would leave that much.

"Q. Indicating where? A. Right here.

"Q. On the back of your hand?

"Mr. McElligott: Indicating the metacarpal area.

"Q. Does it interfere with your employment? A. Not exactly, sir, but I don't have the support in it that I used to have, because out of place.

"Q. Do you feel any pain in it? A. Now and again, it aches.

"Q. You get a twinge? A. Now and again, it would ache a little.

"Q. Is that in bad weather? A. Yes—well, if I walk and it is raining and it is cold, because South Africa is cold now—in the cold weather, it aches.

"Q. As a result of this accident, you were taken off the ship, then, in Norfolk on the 26th? A. Yes."

Page 37, near the bottom:

"Q. So, as a result of this accident, you lost about four or five weeks in wages; is that correct? A. No, sir, I lost more than that.

"Q. Well, you were marked fit for duty when? A. Yes, I was home with a cast for the six weeks, all right. Six weeks—two weeks outpatient is eight weeks.

"Q. When did you join the ship, the Farrell Lines? A. On the 12th of March."

That would be 1965.

"Q. So you lost approximately two months' wages? A. Over that.

"Q. Well, you were paid your wages for twenty days. That runs through somewhere until January 12th, right? A. Yes.

"Q. You were out January, February, March 12. That is two months. Is that when you went to work for the Farrell Lines? A. Yes.

"Q. So you lost approximately two months in wages as an AB?"

That is an able-bodied seaman.

"A. Yes.

"Q. What were your wages at the time, as an AB? A. Four ninety-eight and change. Four ninety-eight and something.

"Mr. McElligott: That is base wages a month?

"The Witness: Yes.

"Q. Plus overtime? A. Plus overtime.

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"Q. After the accident happened and particularly when you told the chief about it—is it the chief mate you told about the accident the next morning? A. Yes.

"Q. Did he go down to the place of the accident to see where it was? A. No, sir.

"Q. He didn't do it in your presence anyway? A. No, sir, not in my presence.

"Q. Did you take anybody to show them where you had your accident? A. No, sir.

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"Q. When you were working as AB at that time"—as an able-bodied seaman—"how much did you make a month with overtime, on an average while at sea? A. About six hundred clear.

"Q. When you say 'clear' you mean take home money after taxes? A. Take home.

"Q. How much would you make before the taxes were taken out, with overtime? Do you know? A. I would say before the taxes is taken out about seven hundred altogether."

Per month, that is.

That is all the questions and answers that I propose to read as a basis for my case. There were some other questions and answers by the defendant's attorney which I don't think were important or add to my case, and therefore I left them out. Thank you.

The Court: Do you wish to read any?

Mr. Butterfield: At this time, your Honor? Yes, I do.

Page 5, line 17:

"Q. When did your accident take place? A. On the 23rd.
"Q. On the 23rd? A. Yes."

Page 8, beginning at line 2:

"Q. When the ship secured on the 22nd in New York? A. No, on the 23rd she secured.

"Q. I don't mean to go to sea. I mean secured here in New York. A. That's right. That was the 23rd, securing.

"Mr. McElligott: He said securing, coming from Weehawken.

"Q. When the ship tied up here in New York— A. Yes.

"Q. —was that in the evening? A. No, the night. The evening, yes, but it was the night.

"Q. About what time did you finish 'ying up? A. I can't rightly remember now.

"Q. Did you stay aboard the ship that night? A. Yes."

Page 9, line 5:

"A. The whole deckhand, all the deckhands were there.

"Q. How many of them were there? A. I suppose the total amount. I didn't check.

"Q. Approximately how many are there? A. Twenty-six AB, three ordinary seamen.

"Q. Nine or ten men? A. And the boatswain. I don't know if she did carry a day man or not.

"Q. Did she carry day men, the MORAZAN? You don't know that? A. I don't know.

"Q. I don't know. A. I don't know.

"Q. Approximately ten men at least? A. Yes.

"Q. What were you assigned to that morning? A. As usual, routine work on deck."

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Page 21:

"Q. So that from the 24th to the 26th was the trip you made, and the ship returned to Norfolk on the 26th, right? A. Yes.

"Q. It was the day after Christmas? A. Yes, sir."

Page 24, line 7:

"Q. Then did you rejoin the ship? A. No, I didn't. I as just a relief.

"Q. Did you throw your card in the Union Hall? A. Yes, I had to go back and get my card.

"Q. Did someone have it? A. No, the card stood there until I was ready to go again.

"Q. Were you re-employed? A. Yes, with Farrell Lines. I went back with Farrell Lines.

"Q. What ship? A. On the AFRICAN SUN.

"Q. Did you sail on her? A. Yes.

"Q. Do you still work for the Farrell Lines? A. Yes.

"Q. Are you between trips now? A. The ship is laid up now on account of the strike with the engineers, so I am waiting to go back to work.

"Q. You are waiting for the strike to end to resume your employment? A. Yes, sir."

I will start with page 33, line 21:

"Q. Do you remember where you bought them?"

Now referring to the shoes.

"A. Let me see where I bought those shoes now—it was in Brooklyn. Yes, I bought the shoes in Brooklyn. It was bought in Brooklyn.

"Q. Brooklyn, you mean— A. Over by one of the Army and Navy stores.

"Q. Downtown Brooklyn? A. Yes, on 4th Avenue.

"Q. Is that near where you live? A. No, that's next to the shipping company, Farrell Lines.

"Q. Do you have those shoes with you aboard the ship you are on now? A. No, those shoes I had, I gave them away. I have another low pair I works in. I have another pair now.

"Q. Is the man you gave them to still aboard the ship? A. No, I gave it away in South Africa, one of the natives.

"Q. Were they worn out? A. No, not exactly, but the heel, after the heel go down, I don't let my foot cap over.

"Mr. McElligott: You mean the heel was worn?

"The Witness: Yes, a little, so I gave them away.

"Q. When was it that you gave the shoes away? A. Last trip on the Farrell Lines.

"Q. What date was that? A. Oh, gosh, that's over two months since I gave that shoe away.

"Q. Some time in April? You returned to the Farrell Lines, to the AFRICAN SUN, did you say? A. Yes, that's about over a month ago that I gave the shoe away.

"Q. Are you still on the same ship? A. Yes.

"Q. What was the name of it again? A. AFRICAN SUN.

"Q. And the trip it made to Africa about a month or two is when you gave the shoes away? A. Yes, sir.

"Q. When you were putting the batten in place, just before you had an accident, did that cause you to lose your balance? A. No, sir."

Page 39:

"Q. Did you have any other damages besides that? A. No, sir.

"Q. You didn't have to pay any private medical doctor? A. No.

"Q. You got all your medical treatment at the United States Public Health Service Hospital? A. Yes, sir."

Page 36, line 23:

"Q. Were you paid your wages through the voyage? A. Yes, sir, I was paid right here in New York."

That is all, your Honor.

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SUPREME COURT, U. S.

FILED

FEB 3 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 872

EDWARD DAVIS,

Petitioner,

—v.—

UNITED FRUIT COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petition should be denied because neither the first nor second question presented was urged or decided below and the third question has been sufficiently answered by the opinion below, 402 F. 2d 328.

Respectfully submitted,

William M. Kimball
Counsel for Respondent